*   **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: <u>15.05.2018</u>

\+   **<u>REFERENCE IN CONT.CAS(C) 772/2013, 347/2013, 484/2014, 584/2014, 648/2014, 48/2016, 483/2016, 484/2016, 1147/2016, 1116/2016, 1251/2016, 78/2017, 132/2017, 197/2017, 204/2017, 216/2017 and 270/2017</u>**

<u>IN THE MATTER OF:</u>

RAJAT GUPTA ..... Petitioner in CONT.CAS(C) 772/2013
MANPREET SINGH BHATIA ..... Petitioner in CONT.CAS(C) 347/2013
DEEPAK BATRA ..... Petitioner in CONT.CAS(C) 484/2014
KAMAL GODWANI ..... Petitioner in CONT.CAS(C) 584/2014
DR. ARUN SHARMA ..... Petitioner in CONT.CAS(C) 648/2014
MANVINDER KAUR ..... Petitioner in CONT.CAS(C) 48/2016
W CDR SITANSHU SINHA ..... Petitioner in CONT.CAS(C) 483/2016
WG CDR SITANSHU SINHA ..... Petitioner in CONT.CAS(C) 484/2016
NAVEEN KUMAR JAIN ..... Petitioner in CONT.CAS(C) 1147/2016
AMRITA KAUR SAXENA ..... Petitioner in CONT.CAS(C) 1116/2016
VIKAS SHARMA ..... Petitioner in CONT.CAS(C) 1251/2016
SEETANGELI BHUTANI ..... Petitioner in CONT.CAS(C) 78/2017
MANVEEN KAUR ..... Petitioner in CONT.CAS(C) 132/2017
MANJUL TANEJA ..... Petitioner in CONT.CAS(C) 197/2017
DEEPA ..... Petitioner in CONT.CAS(C) 204/2017
MITHUN RADHAKRISHNAN.... Petitioner in CONT.CAS(C) 216/2017
AMARJEET SINGH .... Petitioner in CONT.CAS(C) 270/2017

Through: Mr. Brij Bhushan Gupta, Senior Advocate (Amicus Curiae) with Mr. Jai Sahai Endlaw, Advocate
Mr. Prashant Mendiratta, Advocate with petitioner in person in CONT.CAS(C) 772/2013.
Mr. Koplin K. Kandhari & Mr. S.C. Duggal, Advocates in CONT.CAS(C) 347/2013.
Mr. F.K. Jha & Mr. S. A. Singh, Advocates in CONT.CAS(C) 584/2014.
Mr. Sunil Mittal, Senior Advocate with Mr. Dhruv Grover and Ms. Seema Seth, Advocates in CONT.CAS(C) 648/2014.

Mr. Ashish Virmani and Ms. Paridhi Dixit, Advocates in CONT.CAS(C) 483-484/2016.
Mr. C. Rajaram and Ms. T. Kanniappan, Advocates in CONT.CAS(C) 1147/2016.
Ms. Chandrani Prasad, Mr. Chirag Mahalwal and Mr. Sugam Kr. Jha, Advocates in CONT.CAS(C) 78/2017.
Mr. Neeraj K. Sharma and Ms. Nidhi Agarwal, Advocates in CONT.CAS(C) 216/2017.

versus

RUPALI GUPTA ..... Respondent in CONT.CAS(C) 772/2013
SMT SUMITA BHATIA ..... Respondent in CONT.CAS(C) 347/2013
SWATI BATRA ..... Respondent in CONT.CAS(C) 484/2014
ANNU BHARTI ..... Respondent in CONT.CAS(C) 584/2014
POOJA SHARMA ..... Respondent in CONT.CAS(C) 648/2014
BIKRAMJEET SINGH SOKHI AND ANR.
..... Respondent in CONT.CAS(C) 48/2016
PRACHI SINGH alias PRACHI SINHA
..... Respondent in CONT.CAS(C) 483/2016
PRACHI SINGH alias PRACHI SINHA
..... Respondent in CONT.CAS(C) 484/2016
INDU JAIN .....Respondent in CONT.CAS(C) 1147/2016
GAURAV SAXENA .....Respondent in CONT.CAS(C) 1116/2016
SHALINI CHHABRA .....Respondent in CONT.CAS(C) 1251/2016
AJAY BHUTANI ..... Respondent in CONT.CAS(C) 78/2017
NIPUR KAPUR ..... Respondent in CONT.CAS(C) 132/2017
SUMAN BASWAL ..... Respondent in CONT.CAS(C) 197/2017
KAMAL SINGH ..... Respondent in CONT.CAS(C) 204/2017
AASTHA SAHDEV ..... Respondent in CONT.CAS(C) 216/2017
GEETANJALI ..... Respondent in CONT.CAS(C) 270/2017

Through: Ms. S. Chaudhary and Ms. Aarzoo Aneja, Advocates in CONT.CAS(C) 772/2013.
Mr. Rajat Aneja and Ms. Chandrika Gupta, Advocates in CONT.CAS(C) 347/2013.
Ms. Renu Verma, Adv.in CONT.CAS(C) 484/2014

Mr. Prashant Mendiratta, Adv. in CONT.CAS(C) 648/2014.
Ms. Sunieta Ojha, Advocate in CONT.CAS(C) 483-484/2016.
Mr. Ashisht Bhagat and Mr. Akhil Suri, Advocates in CONT.CAS(C) 78/2017.
Mr. Vivek Singh and Mr. Randhir Kumar, Advs. in CONT.CAS(C) 197/2017.
Respondent in person in CONT.CAS(C) 270/2017.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MS. JUSTICE DEEPA SHARMA

HIMA KOHLI, J.

1. These matters have been placed before this Bench by Hon'ble the Acting Chief Justice in terms of an order dated 09.01.2017, passed by a learned Single Judge of this Court in the captioned contempt petitions wherein the following four questions of law have been framed for consideration:-

> *"A) Whether a party, which has under a settlement agreement decreed by a Court undertaken to file a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both and has also undertaken to appear before the said Court for obtaining divorce "can be held liable for contempt", if the said party fails to file or appear in the petition or motion or both to obtain divorce in view of the option to reconsider/renege the decision of taking divorce by mutual consent under Section 13B(2) of the Act?*
>
> *B) Whether by undertaking before a Court to file a second motion under Section 13B(2) of the Act, 1955 at Section 13B(1) stage or by giving an undertaking to a Court to that effect in a separate court proceeding, a party waives its right to*

rethink/renege under 13B(2) of the Act, 1955? If yes, whether such right can be waived by a party under Section 13B(2) of the Act, 1955?

C) Whether any guidelines are required to be followed by the Court while recording the undertaking/agreement of the parties with respect to a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both for obtaining divorce?

D) Whether the judgment in Avneesh Sood (supra) and Shikha Bhatia (supra) are good law in view of the doubts expressed by this Court in paras 19 to 28 and in view of the Division Bench judgment in Dinesh Gulati (supra).”

2. We may clarify that the reference made to the three decisions referred to in para (D) above, is as follows:-

(i) **CONT.CAS(C) 559/ 2011** entitled Avneesh Sood Vs. Tithi Sood decided on 30.04.2012 reported as **2012 SCC Online 2445**.

(ii) Shikha Bhatia Vs. Gaurav Bhatia & Ors. reported as **178** (**2011**) **DLT 128**.

(iii) **MAT. APP. (F.C.) 70/2016** entitled Dinesh Gulati Vs. Ranjana Gulati decided on 02.08.2016.

FACTUAL MATRIX

3. The backdrop in which the reference has been made by the learned Single Judge on the four questions of law extracted above, is that a batch of contempt petitions were placed before the said Court, alleging *inter alia* willful disobedience of the undertaking given by a spouse to appear, sign and file, both, the Section 13B(1) petition and the Section 13(B)(2) motion under

the Hindu Marriage Act, 1955 (in short '**the Act**'). The undertakings given by the spouses were accepted by the Court either at the stage of filing the Section 13B(1) petition or were incorporated in a consent decree. It was noted that except in CONT.CAS(C) 1147/2016 and 1251/2016, the undertakings in all the remaining cases, as furnished to the concerned courts and duly accepted, were against consideration. Following is a tabulated statement of the factual status of each case in these batch of petitions:-

Sr. No.	**Case No.**	**Who is the petitioner? (Husband or Wife)**	**Was there a mutual settlement seeking divorce by consent?**	**Did the parties file a First Motion?**	**Stage of filing of contempt, is it before First motion or after first motion?**
1	Cont. CAS(C) 772/13- Rajat Gupta vs Rupali Gupta	Husband	Yes. Joint statement dated 16.10.2012 recorded in a petition u/S 13(1)(i-a) of HMA Act. - In Court.	Yes. First Motion allowed vide order dated 03.11.2012	After First Motion and before Second motion.
2	Cont. CAS (C) 347/2013- Manpreet Singh Bhatia v. Smt Sumita Bhatia	Husband	Yes. MOU dated 08.11.2012. - Outside Court	Yes. First Motion allowed vide order dated 08.11.2012	After First Motion and before Second motion.
3	Cont. Cas (C) 484/14 Deepak Batra Vs. Swati Batra	Husband	Yes. Settlement recorded by Mediation Centre, Saket on 17.10.2013. - In Court	After First motion was moved, then it was withdrawn vide order dated 05.05.2014.	After First motion was moved.
4	Cont. CAS (C) 584/2014- Kamal	Husband	Yes. Settlement recorded by Mediation Centre,	Yes. First motion allowed vide	After First motion before

	Godwani v. Annu Bharti		KKD on 18.12.2012. - In Court.	order dated 01.08.2013.	second motion.
5.	Cont. CAS(C) 648/14- Dr. Arun Sharma vs. Pooja Sharma	Husband	Yes. Joint statement of settlement recorded on 01.12.2012 before Family Court, Patiala House. - In Court.	No. First Motion was not signed by wife.	Before First motion.
6	Cont. CAS(C) 48/16- Manvinder Kaur vs. Bikramjit Singh Sokhi and Anr.	Wife	Yes. Settlement recorded by Mediation Centre dated 29.05.2015. - In Court.	No. First Motion was not signed.	Before First motion.
7.	Cont. CAS (C) 483/2016 W CDR Sitanshu Sinha vs. Prachi Singh @ Prachi Sinha	Husband	Yes- Settlement Agreement dated 05.05.2015. - Outside Court	Yes. First Motion was allowed vide order dated 01.06.2015.	After First motion, before Second motion
8.	Cont. CAS (C) 484/2016 WG CDR Sitanshu Sinha vs. Prachi Singh @ Prachi Sinha	Husband	Yes- Settlement Agreement dated 05.05.2015. - Outside Court	Yes. First Motion was allowed vide order dated 01.06.2015.	After First motion, before Second motion
9.	Cont Cas (C) 1147/16 Naveen Kumar Jain Vs. Indu Jain	Husband	Yes. Settlement Deed dated 26.05.2015 - Outside Court	Yes. First Motion allowed vide order dated 06.06.2015.	After First Motion and before Second motion.
10	Cont. CAS(C) 1116/16- Amrita Kaur Saxena vs.	Wife	Yes. MOU dated 12.02.2015. - Outside Court	Yes. First Motion allowed vide order dated 24.03.2015.	After First motion before Second motion.

	Gaurav Saxena				
11	Cont. CAS(C) 1251/2016- Vikas Sharma vs. Shalini Chhabra	Husband	Yes. Memorandum of Understanding dated 24.09.2015. - Outside Court	Yes. First Motion allowed vide order dated 22.02.2016.	After First motion before Second motion.
12	Cont. CAS(C) 78/2017- Seetangeli Bhutani vs. Ajay Bhutani	Wife	Yes. MOU dated 02.04.2015. - Outside Court	Yes. First Motion allowed vide order dated 20.05.2016.	After First Motion and before Second motion.
13	Cont. CAS(C) 132/2017- Smt. Manveen Kaur vs. Nipun Kapur	Wife	Yes- Joint statement dated 16.09.2015 recorded in First Motion petition. - In Court.	Yes. First Motion allowed vide order dated 16.09.2015	After First Motion and before Second motion.
14	Cont. CAS(C) 197/2017- Manjul Taneja vs. Suman Baswal	Husband	Yes. Memorandum of Settlement dated 01.09.2016 recorded by Counselor, Family Court. - In Court	Yes. First Motion allowed vide order dated 02.09.2016.	After First motion and before Second motion.
15	Cont.CAS (C) 204/17 Deepa Vs. Kamal Singh	Wife	Yes. Settlement Agreement dated 26.03.2014 recorded by Mediation Centre. - In Court.	Yes, First Motion allowed vide order dated 06.12.2014.	After First motion before second motion.
16	Cont. CAS(C) 216/2017- Mithun Radhakrishnan vs. Aastha Sahdev	Husband	Yes. Memorandum of Settlement dated 30.04.2015. - Outside Court	Yes. First Motion allowed vide order dated 02.05.2015.	After First motion before Second motion.

17	Cont. CAS(C) 270/17- Amarjeet Singh vs. Geetanjali	Husband	Yes. MOU dated 02.02.2016 in Mediation Centre. - In Court	Yes. First Motion allowed vide order dated 07.04.2016.	After First motion before Second motion.

4. Confronted with the differing stands taken by both sides where on the one hand, learned counsels for the petitioners had urged that contempt is attracted for breach of the undertaking accepted by the court to file a Section 13B(1) petition as well as a Second motion under Section 13B(2) of the Act for divorce and it should be treated as a willful breach of the undertaking given to the court, and on the other hand, the stand of the learned counsels for the respondents was that refusal on the part of a spouse to join/give consent for recording a statement under Section 13B(2) of the Act, for the Family Court to pass a decree of divorce based on mutual consent, as contemplated under Section 13B of the Act, cannot constitute contempt and the court does not have the jurisdiction to go into the *bonafides* or reasonableness of the withdrawal of the consent, the learned Single Judge had examined the provisions of Section 13B of the Act and the judicial precedents cited by both sides and noticed that two learned Single Judges of this Court in the cases of Shikha Bhatia (supra) and Avneesh Sood (supra), had opined that a spouse, who gives an undertaking to the court to abide by the consent given in the First motion for dissolution of marriage under Section 13B(1) of the Act and for moving a Second motion petition, cannot be permitted to resile from such an undertaking on the basis of an agreement arrived at between the parties and any attempt to resile therefrom would

amount to a breach of the undertaking accepted by the court and therefore, attract contempt proceedings.

5. The decision of the Division Bench of this Court in the case of Dinesh Gulati (supra) was also brought the notice of the learned Single Judge, wherein recourse to contempt proceedings against the respondent/wife by the appellant/husband on a grievance that despite a mutual consent recorded before the Family Court to dissolve their marriage, the wife was not cooperating with the husband, was questioned and further, *suo moto* contempt proceedings initiated by the learned Family Court against the husband for non-compliance of the consent order and joint statement recorded by the parties earlier thereto, were quashed. The Division Bench held that such an order of initiating *suo moto* contempt proceedings neglects the mutuality aspect provided for under Section 13B of the Act and once the parties were unable to or did not wish to proceed with the agreement for mutual consent divorce, then the only recourse was to restore the original divorce petition. Counsels for some of the petitioners had urged that that the decision in the case of Dinesh Gulati (supra) is *per incuriam* as it has not taken note of the judgments of the learned Single Judges in the cases of Shikha Bhatia (supra) and Avneesh Sood (supra),

6. Recording the submissions of the learned counsels for the parties, the learned Single Judge expressed a view that the Division Bench had taken a diametrically different view in the case of Dinesh Gulati (supra) vis-à-vis that expressed by the two learned Single Judges of this Court in the cases of Shikha Bhatia (supra) and Avneesh Sood (supra) and accordingly proceeded to frame four questions of law extracted above, inviting a decision by a

Division Bench. It is in the aforesaid factual background that these matters have been placed before this Bench.

RELEVANT STATUTORY PROVISIONS

7. The relevant provisions of the Hindu Marriage Act, 1955 and the Contempt of Courts Act, 1971 are extracted below:-

> *"**THE HINDU MARRIAGE ACT, 1955**
> **Section 13B Divorce by mutual consent. —***
> *(1) Subject to the provisions of this Act a petition for dissolution of marriage by a decree of divorce may be presented to the district court by both the parties to a marriage together, whether such marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved.*
>
> *(2) On the motion of both the parties made not earlier than six months after the date of the presentation of the petition referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn in the meantime, the court shall, on being satisfied, after hearing the parties and after making such inquiry as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true, pass a decree of divorce declaring the marriage to be dissolved with effect from the date of the decree.*
> *XXX XXX XXX*
>
> ***23 Decree in proceedings .—***
> *(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—*
> *(a) XXX XXX XXX*
> *(b) XXX XXX XXX*

[(bb) when a divorce is sought on the ground of mutual consent, such consent has not been obtained by force, fraud or undue influence, and]

(c) XXX XXX XXX

(d) XXX XXX XXX

(e) XXX XXX XXX

(2) Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties:

[Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of section 13.]

XXX XXX XXX

CONTEMPT OF COURTS ACT, 1971

2. Definitions *- In this Act, unless the context otherwise requires, -*

(a) XXX XXX XXX

(b) "civil contempt" means wilful disobedience to any judgment, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court;

10. Power of High Court to punish contempts of subordinate courts. *- Every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempt of courts subordinate to it as it has and exercises in respect of contempts of itself:*

Provided that no High Court shall take cognizance of a contempt alleged to have been committed in respect of a court subordinate to it where such contempt is an offence punishable under the Indian Penal Code (45 of 1860).

11. Power of High Court to try offences committed or offenders found outside jurisdiction*. - A High Court shall have*

jurisdiction to inquire into or try a contempt of itself or of any court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of contempt is within or outside such limits.

12. Punishment for contempt of court. *- (1) Save as otherwise expressly provided in this Act or in any other law, a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both:*
Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.
Explanation. - An apology shall not be rejected merely on the ground that it is qualified or conditional if the accused makes it bona fide.
(2) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in sub-section (1) for any contempt either in respect of itself or of a court subordinate to it.
(3) Notwithstanding anything contained in this section, where a person is found guilty of a civil contempt, the court, if it considers that a fine will not meet the ends of justice and that a sentence of imprisonment is necessary shall, instead of sentencing him to simple imprisonment, direct that he be detained in a civil prison for such period not exceeding six months as it may think fit.
XXX XXX XXX

13. Contempts not punishable in certain cases.- *Notwithstanding anything contained in any law for the time being in force,-*
(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bonafides."

DECISIONS IN SHIKHA BHATIA (SUPRA), AVNEESH SOOD (SUPRA) AND DINESH GULATI (SUPRA)

8. We now proceed to examine the facts of Shikha Bhatia (supra) and Avneesh Sood (supra), which are stated to be inconsistent with the decision of the Division Bench in the case of Dinesh Gulati (supra).

9. In the case of Shikha Bhatia (supra), during the pendency of the petition filed before the High Court for anticipatory bail in a FIR registered against him and his parents, the respondent/husband had entered into an agreement with the petitioner/wife, wherein he had agreed to pay a quantified amount to her in full and final satisfaction of all her claims and in consideration thereof, the wife had agreed to sign the First motion for grant of divorce by mutual consent and then the petition under Section 13B(2) of the Act. In terms of the said settlement, the wife had also agreed not to object to quashing of the FIR registered against the respondent. When the husband refused to abide by the undertaking given to the wife by making over the payments etc., she filed contempt proceedings with a grievance that the respondent No.1 had willfully violated the undertaking given before the court. The learned Single Judge observed that the husband having taken advantage of the agreement entered into with the wife in terms of the settlement, he could not withdraw the same to her detriment. It was thus held that the husband had willfully and deliberately disregarded the settlement

recorded in court on his own representation and accordingly declared him guilty of contempt. For holding so, reliance was placed on the decision of the Supreme Court in the case of Kapildeo Prasad Sah vs. State of Bihar reported as **(1999) 7 SCC 569**, that had highlighted the fact that for holding a party guilty of civil contempt, the element of willful disobedience of the judgment or order of the court must be established.

10. In the case of Avneesh Sood (supra), disputes and differences had arisen between the parties after a decade of their marriage and they had executed a Memorandum of Understanding (MOU) agreeing *inter alia* to seek divorce by mutual consent. The said MOU had recorded several terms and conditions for a one time settlement wherein the husband had agreed to pay a quantified amount to the wife, in installments. There were other terms and conditions laid down in the MOU, relating to the custody of their minor child. After execution of the MOU, the parties had filed a joint petition for dissolution of marriage by mutual consent under Section 13B(1) of the Act and had incorporated therein the terms and conditions of settlement, which were duly accepted by the court during the First motion proceedings. Later on, when the wife refused to cooperate with the husband for moving the Second motion petition under Section 13B(2) of the Act, he filed a contempt petition against the respondent/wife on the ground that she had withdrawn from the undertaking given by her to the court at the time of filing the petition for mutual divorce under Section 13B(1) of the Act before the Family Court. Relying on the decision of the Single Judge in the case of Shikha Bhatia (supra) and of the Karnataka High Court in the case of S. Balasubramaniyam v. P. Janakaraju & Anr. reported as **2004 (5) Kar. LJ 338**

(DB), the learned Single Judge held the wife guilty of contempt of court for having breached the undertaking given to the learned ADJ in the First motion divorce proceedings under Section 13B(1) of the Act and issued a notice to show cause to her as to why she should not be punished for contempt of court, particularly when she had derived benefits from the husband in terms of the MOU.

11. Coming next to the decision of the Division Bench in the case of Dinesh Gulati (supra), in the said case, the appellant/husband and the respondent/wife had made a joint statement before the Family Court on 22.07.2014, stating that they had resolved all their matrimonial disputes including disputes relating to dowry/*Stridhan* articles and permanent alimony and they had decided to dissolve their marriage by mutual consent. One of the terms of settlement between the parties was that the husband would transfer an immovable property in the name of his wife within one month and pay her a particular sum of money on or before the Second motion was moved by the parties under Section 13B(2) of the Act. After about two years from the date their joint statement was recorded before the Family Court, the husband filed an application for initiating contempt proceedings against the wife on the ground of non-compliance of the order dated 22.07.2014, stating *inter alia* that she was not coming forth to file a joint petition under Section 13B(1) of the Act for obtaining a decree of divorce by mutual consent. The wife had countered the said submission by pointing out to the Family Court that the husband had not complied with his part of the obligations undertaken in the joint statement, having failed to transfer the immovable property in her name, within the agreed timeline.

12. On hearing the parties and perusing their joint statement recorded on 22.07.2014 and noting the resistance on the part of the husband to transfer the immovable property in favour of the wife despite the terms and conditions stipulated in the settlement forming a part of the joint statement, the learned Family Court declined to initiate contempt proceedings against the wife and dismissed the husband's application. It then proceeded to issue a notice to show cause to the husband calling upon him to explain why contempt proceedings should not be initiated against him for non-compliance of the settlement recorded in the joint statement dated 22.07.2014.

13. Aggrieved by the *suo moto* contempt proceedings initiated by the Family Court, the husband approached the High Court for relief. The Division Bench expressed a view that recourse to *suo moto* contempt proceedings in the circumstances of the case, neglects the mutuality aspect provided under Section 13B of the Act. The court opined that initiation of *suo moto* contempt proceedings was a coercive process, foreclosing the choice that the parties have in terms of the mechanism laid down under Section 13B of the Act, which mandates a mutuality for grant of consent decree of divorce, split into two stages. It was in the aforesaid context that the appeal filed by the husband was allowed, the order dated 04.04.2016, passed by the learned Family Court, ordering initiation of contempt proceedings against him, was set aside and the original divorce petition was restored for adjudication on merits as the parties did not wish to proceed further with their agreement for mutual consent divorce.

14. Questions No.(A) and (B) framed above require an interpretation of Section 13B of the Act in the context of maintainability of contempt

proceedings in the event one party fails to file or appear for moving a petition under Section 13B(1) or a motion under Section 13B(2) of the Act or take both steps, to obtain divorce. We have also been called upon to express a view on the effect of furnishing an undertaking before a court, either at the two stages contemplated in Section 13B or in separate court proceedings and whether such an act will amount to waiving the rights of a party under Section 13B(2) of the Act. Question No.(C) formulated by the learned Single Judge invites guidelines, if any, to be followed by the courts at the time of recording undertakings/agreements of the parties with respect to the two stages contemplated under Section 13B of the Act, for obtaining divorce. Question No. (D) juxtaposes the views expressed by the two learned Single Judges in the cases of Shikha Bhatia (supra) and Avneesh Sood (supra), wherein the defaulting spouses were held guilty of contempt of court for breaching the undertakings given by them, for obtaining divorce by mutual consent, against the decision of the Division Bench in the case of Dinesh Gulati (supra), wherein *suo moto* contempt proceedings initiated by the Family Court against the husband for breaching the undertaking recorded in his statement made jointly with the wife before the Family court, were quashed and the original divorce petition restored to its original position.

ARGUMENTS ADDRESSED BY COUNSELS FOR THE PARTIES

15. Before proceeding to answer the aforesaid questions, we may note that vide order dated 25.4.2017, CONT.CAS(C) 772/2013 was made the lead matter for the purposes of addressing arguments and Mr. B.B. Gupta, Senior Advocate was appointed as an *Amicus Curiae* to assist the Court. The

contentions of the learned Amicus Curiae and the counsels for the parties were as follows:-

16. Mr. B.B. Gupta, the learned Amicus Curiae had made the following submissions:-

(i) That mutual consent is a *sine qua non* for passing a decree of divorce and the said consent must be valid and subsisting until the time a final decree of divorce is passed. For the said proposition, reliance was placed on the judgment of the Supreme Court in the case of Sureshta Devi vs. Om Prakash reported as **(1991) 2 SCC 25**.

(ii) That courts cannot presume consent of a party merely because both the parties are signatories to the First motion under Section 13B of the Act. Before passing a decree of divorce, the court remains under an obligation to satisfy itself as to whether the consent given by the parties is a valid one. For the said proposition, reliance was placed on Smruti Pahariya vs. Sanjay Paharia reported as **(2009) 13 SCC 338**, Anil Kumar Jain vs. Maya Jain reported as **(2009) 10 SCC 415** and Hitesh Bhatnagar vs. Deepa Bhatnagar reported as **AIR 2011 SC 1637**.

(iii) That courts are empowered to enquire into the *bona fides* of the spouse who withdraws the consent after filing a petition under Section 13B of the Act. Reference was made to Rajesh R. Nair vs. Meera Babu reported as **AIR 2014 Kerala 44**, **Family Court Appeal No.61/2010** Prakash Alumal Kalandari vs. Mrs. Jahnavi Prakash Kalandari decided by the Bombay High Court on 06.05.2011 reported as **AIR 2011 BOM 119**, and **Family Court Appeal No.230/2014** in Mrs. Ishita Kunal

Sangani vs. Kunal Sudhir Sangani decided by the Bombay High Court on 07.10.2014 reported as **2014 (6) ABR 767**.

(iv) That violation or breach of an undertaking, which forms a part of the decree of the court, amounts to contempt of court, irrespective of whether it is open to the decree holder to execute the decree. In the said context, Rama Narang vs. Ramesh Narang and Anr. reported as **2006(11) SCC 114** was cited to understand the definition of the term *'undertaking'* and the consequences of a breach thereof and Ashok Paper Kamgar Union vs. Dharam Godha and Ors. reported as **2003(11) SCC 1** was quoted wherein the Supreme Court had explained the definition of the terms, '*willful*' and '*civil contempt*'. The legal options available for seeking enforcement of an interim/final decree including an undertaking given to the court was highlighted by placing reliance on Kanwar Singh Saini vs. High Court of Delhi reported as (**2012) 4 SCC 307.**

(v) That a statutory right can be waived by a person subject to the condition that no public interest is involved therein. For this, reference was made to Krishna Bahadur vs. Purna Theatre and Ors. reported as **(2004) 8 SCC 229**.

(vi) The decisions in the case of Hirabai Bharucha vs. Pirojshah Bharucha reported as **AIR (32) 1945 Bombay 537** and Jyoti vs. Darshan Nirmal Jain reported as **AIR 2013 Gujarat 2018** were cited, wherein marriage has been declared a matter of public policy. Reference was also made to Nagendrappa Natikar vs. Neelamma reported as **2014(14) SCC 452**, to state that the Supreme Court has held that the right to claim

maintenance cannot be waived by a wife, it being a social welfare legislation.

(vii) Lastly, reference was made to the judgment of a Division Bench of this Court in the case of Angle Infrastructure Pvt. Ltd. vs. Ashok Manchanda & Ors. reported as **2016(156) DRJ 290(DB),** wherein the mode and manner of seeking execution of a settlement agreement arrived at through the ADR process, was exhaustively examined.

17. Mr. Sunil Mittal, learned Senior Advocate had submitted that though marriage in Hindu law is treated as a sacrament and not a contract, on the introduction of Section 13B in the year 1976, the Act of 1955 provides an option for dissolution of a marriage by mutual consent. He canvassed that once the parties arrive at a settlement by invoking the Alternate Dispute Resolution (ADR) mechanism and the said mediated settlement is accepted by the court, it becomes a decree, which is executable and the provisions of Section 13B of the Act follow thereafter. In the event either of the parties to the settlement are allowed to renege from such a settlement arrived at either through mediation or out of court, then the entire object of ADR will be brought to a naught and in those circumstances, the law of contempt must be exercised to prevent a defaulting party from breaching the Settlement Agreement. Learned counsel further argued that Section 13B(1) of the Act embodies and implies the consent of both the parties, who cannot be permitted to renege and the underlying purpose of giving a window of six months to the spouses under Section 13B(2) of the Act, is only to enable them to reconcile their disputes, but not to withdraw from the consent already given and prolong the agony of the other spouse. Much emphasis was laid by

learned counsel on the observations made in the case of Afcons Infrastructure Ltd. and Anr. vs. Cherian Varkey Construction Company Private Limited and Ors. reported as **(2010) 8 SCC 24**, where the alternate dispute resolution mechanism and execution of a settlement arrived at through the said mechanism, were delved into at length and explained by the Supreme Court.

18. The decision in the case of Dr. Keshaorao Krishnaji Londhe vs. Mrs. Nisha Londhe reported as **AIR 1984 BOMBAY 413** was cited by Mr. Mittal, Senior Advocate to urge that there has been a sea change in the concept of public policy inasmuch as prior to the year 1964, only judicial separation was permissible on the ground of cruelty but thereafter, divorce was permitted after waiting for a period of two years from the date of passing a decree of judicial separation, subject to certain conditions. Post the amendments to the Act of 1955, when Section 13B came to be enacted, the "*fault theory*" that was predominant for grant of a divorce or a judicial separation, was treated as outdated. The case of Shri Lachoo Mal vs. Radhey Shyam reported as **1971(1) SCC 619,** wherein the doctrine of waiver was interpreted by the Supreme Court, was cited to urge that unless there is any express prohibition against contracting out of a Statute, questions cannot be raised on anyone entering into such a contract in his private capacity, without infringing any public right or public policy. The decision in the case of Rajiv Chhikara vs. Sandhya Mathur reported as **2017 (161) DRJ 80 (DB)** was relied on to emphasize that resiling from a settlement agreement also constitutes mental cruelty.

19. A recent decision of the Supreme Court in the case of Amardeep Singh vs. Harveen Kaur reported as **(2017) 8 SCC 746** was quoted by the learned

counsel to buttress his argument that even the Supreme Court has acknowledged the change in public policy by permitting waiver of the statutory period of six months, contemplated in Section 13B of the Act, with the object of preventing a forcible perpetuation of the status of matrimony between unwilling partners. He concluded his arguments by stating that powers of contempt must be invoked by courts to prevent breach of contract and to curtail the prolonged agony of the parties by compelling them to remain joined in a dead marriage.

20. Mr. Ashish Virmani, learned counsel largely supported the arguments addressed by Mr. Sunil Mittal, Senior Advocate. He referred to Supreme Court Bar Association vs. Union of India and Anr. reported as **(1998) 4 SCC 409** and T. Sudhakar Prasad vs. Govt. of A.P. and Ors. reported as **(2001) 1 SCC 516** to urge that powers of contempt are inherent powers vested in the Supreme Court and the High Courts that cannot be whittled down or taken away by any legislative enactment subordinate to the Constitution of India. The said powers must be exercised in circumstances where one of the parties breaches the terms and conditions of the settlement for obtaining a decree of divorce by mutual consent as contempt proceedings operate in an entirely different field and do not stem either from the provisions of Section 13B(1) or Section 13B(2) of the Act. He stated that the consequences of non-filing of the joint motion for mutual divorce under Section 13B(2) of the Act cannot impinge on the courts' independent powers to initiate contempt proceedings, after it has examined whether an undertaking has been furnished by a spouse and if so, whether there is any justification for violating the said undertaking.

21. Ms. Chandrani Prasad, learned counsel also endorsed the submissions made by Mr. Sunil Mittal, Senior Advocate and Mr. Ashish Virmani, Advocate. She particularly referred to the provisions of Section 23(1)(bb) of the Act to argue that only if a court is satisfied that a divorce is being sought on the ground of mutual consent and such a consent has not been obtained by exercising force, fraud or undue influence, irrespective of whether such a proceeding is defended or not, then in case of a breach of the agreement/undertaking given by a spouse, contempt proceedings will lie.

22. Mr. Prashant Mendiratta, learned counsel canvassed that it is a settled position of law that an undertaking given to the court and orders delivered by courts are to be complied with under all circumstances and a person can contract himself out of a statutory right intended for his/her benefit so long as such an act does not impinge upon a public policy. He submitted that a contract under which a person waives his right, is valid and enforceable and such an act of waiver is distinguishable from the doctrine of *estoppels*, as clarified in the case of Shri Lachoo Mal (supra) and Krishna Bahadur (supra); that a right can be waived by a party for whose benefit the said right exists, as held in Municipal Corporation of Greater Bombay vs. Dr. Hakimwadi Tenants' Association ad Ors. reported as **(1988) Supp. SCC 55** and Union of India vs. Pramod Gupta (Dead) By LRs and Ors. reported as **(2005) 12 SCC 1**; that an order of the court or an undertaking given to the Court must be obeyed by all the parties concerned till such an order is set aside, as held in S. Balasubramaniyam (supra); that a joint petition under Section 13B of the Act of 1955 cannot be withdrawn by a party for malafide and extraneous reasons as held in Rajesh vs. Mrs. Bhavna reported as

2008(6) Mh.L.J. 853. To buttress his argument that the "cooling period" between a petition filed under Section 13B(1) and a joint motion filed under Section 13B(2) of the Act, is meant to explore reconciliation between the parties and a consent can be withdrawn by either spouse at any time before a decree is passed, he alluded to the decisions in the case of Sureshta Devi (supra), Anil Kumar Jain (supra) and Hitesh Bhatnagar (supra).

23. Per contra, Mr. Rajat Aneja, learned counsel laid much emphasis on the fact that a marriage is a sacrament in the Hindu Law and therefore, it has a public policy dimension. He cited Pirojshah Bharucha's case (supra) and Jyoti's case (supra) to submit that every effort must be made by the Courts to sustain the institution of marriage as prescribed in Section 23 of the Act, and Section 9 of the Family Courts Act. It was submitted that if a contract between the spouses recording the terms of settlement runs against the public policy, then it must be treated as void *ab initio* and unenforceable in law and in those circumstances, contempt proceedings cannot be resorted to. In the event of non-filing of a joint motion under Section 13B(2) of the Act, as may have been agreed upon by the parties, contempt proceedings will not lie as a statutory right vested in a party to rethink, cannot be waived. He canvassed that the consequences of non-compliance of the terms and conditions recorded in a settlement or an undertaking given by either spouse, can only result in restoration of status quo *ante*. Learned counsel stated that the decision of the Supreme Court in the case of Sureshta Devi (supra) remains good law. Reliance was placed by him on Inderjit Kaur vs. Rajinder Singh reported as **18 (1980) DLT 197** and Ashish Ranjan vs. Anupma Tandon and Anr. reported as **(2010) 14 SCC 274,** to state that if an agreement between

the parties would result in defeating the provisions of a Statute or is in violation of an enactment, then it cannot result in any contempt proceedings and further, that a change in the circumstances of a case or subsequent developments must be taken into consideration for dropping contempt proceedings.

JUDICIAL PRONOUNCEMENTS ON THE SCOPE OF SECTION 13B OF THE HINDU MARRIAGE ACT, 1955 AND THE RIGHT TO WITHDRAW CONSENT

24. First, a glance at the statutory provisions is necessary. Section 13B of the Act requires that a petition for divorce by mutual consent must be presented to the court jointly by both the parties. The said provision contemplates two stages. The first stage is of Section 13B(1) that lays down the essential requirements to be fulfilled by the parties as detailed below:-

(i) That the petition for divorce must be presented to the District Court.

(ii) That the said petition must be presented jointly, by both the parties to a marriage whether such a marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976.

(iii) That the parties have been living separately for a period of one year.

(iv) That the parties have not been able to live together and

(v) That the parties mutually agreed that the marriage should be dissolved.

It is clear from the aforesaid conditions prescribed in Section 13B(1) that it is mandatory in nature and certain specific jurisdictional facts must be in existence for the Family court to assume jurisdiction of the case and entertain a petition for divorce by mutual consent.

25. The second stage is of Section 13B(2) that relates to the manner in which the court exercises its jurisdiction, provides that both the parties must again appear in the Second motion before the court. The parties are also required to make a joint motion not less than six months after the date of presentation of the first motion and not later than 18 months after the said date. It is at the stage of the Second motion that the court must conduct an enquiry as it may consider necessary, to satisfy itself as to the genuineness of the averments made in the petition and also to verify as to whether the said consent was not obtained by force, fraud or undue influence, as contemplated under Section 23(1)(bb) of the Act. The enquiry that the court is required to undertake, may include a hearing or the examination of the parties. Only when the court is satisfied after conducting an enquiry in the manner it thinks fit that the consent of the parties was not obtained by fraud, force or undue influence and that they had mutually agreed to dissolve the marriage, should a decree of divorce be passed.

26. In the case of Sureshta Devi (supra), the question that arose before the Supreme Court was as to whether it is open to one of the spouses at any time till a decree of divorce is passed, to withdraw the consent given to the petition filed under Section 13B of the Act. The Supreme Court noticed the divergent views expressed by different High Courts. The Bombay High Court, Delhi High Court and Madhya Pradesh High Court took a view that the critical time for the consent for divorce under Section 13B was when the first petition was filed and if the consent was given voluntarily, it was not possible for any party to withdraw the said consent. On the other hand, the

Kerala High Court, Punjab and Haryana High Court and Rajasthan High Court held that it is open to one of the spouses to withdraw the consent given to the petition at any time before the court passes a decree of divorce. On interpreting Section 13B(2) of the Act and analyzing the divergent views expressed by different High Courts, the Supreme Court approved the view expressed by the High Courts of Kerala, Punjab & Haryana High Court and Rajasthan on the interpretation of Section 13 B(2) and held that:-

> *"13.* ***From the analysis of the Section, it will be apparent that the filing of the petition with mutual consent does not authorise the court to make a decree for divorce. There is a period of waiting from 6 to 18 months. This interregnum was obviously intended to give time and opportunity to the parties to reflect on their move and seek advice from relations and friends. In this transitional period one of the parties may have a second thought and change the mind not to proceed with the petition. The spouse may not be party to the joint motion under sub-section (2). There is nothing in the Section which prevents such course.*** *The Section does not provide that if there is a change of mind it should not be by one party alone, but by both. The High Courts of Bombay and Delhi have proceeded on the ground that the crucial time for giving mutual consent for divorce is the time of filing the petition and not the time when they subsequently move for divorce decree. This approach appears to be untenable.* ***At the time of the petition by mutual consent, the parties are not unaware that their petition does not by itself snap marital ties. They know that they have to take a further step to snap marital ties. Sub- section (2) of Section 13-B is clear on this point.*** *It provides that "on the motion of both the parties" .... if the petition is not withdrawn in the meantime, the Court shall pass a decree of divorce What is significant in this provision is that there should also be mutual consent when they move the court with a request to pass a decree of divorce.* ***Secondly, the Court shall be satisfied***

about the bonafides and the consent of the parties. If there is no mutual consent at the time of the enquiry, the court gets no jurisdiction to make a decree for divorce. *If the view is otherwise, the Court could make an enquiry and pass a divorce decree even at the instance of one of the parties and against the consent of the other. Such a decree cannot be regarded as decree by mutual consent."* (emphasis added)

27. The decision in the case of Sureshta Devi (supra) was endorsed by a three Judge Bench of the Supreme Court in the case of Smruti Pahariya (supra) in the following words:-

"42. ***We are of the view that it is only on the continued mutual consent of the parties that a decree for divorce under Section 13-B of the said Act can be passed by the court. If petition for divorce is not formally withdrawn and is kept pending then on the date when the court grants the decree, the court has a statutory obligation to hear the parties to ascertain their consent.*** *From the absence of one of the parties for two to three days, the court cannot presume his/her consent as has been done by the learned Family Court Judge in the instant case and especially in its fact situation, discussed above.*
43. ***In our view it is only the mutual consent of the parties which gives the court the jurisdiction to pass a decree for divorce under Section 13-B. So in cases under Section 13-B, mutual consent of the parties is a jurisdictional fact.*** *The court while passing its decree under Section 13-B would be slow and circumspect before it can infer the existence of such jurisdictional fact. The court has to be satisfied about the existence of mutual consent between the parties on some tangible materials which demonstrably disclose such consent."*
(emphasis added)

28. Following the decision in the case of Sureshta Devi (supra), in the case of Anil Kumar Jain (supra), the Supreme Court had clarified that the doctrine of irretrievable breakdown of marriage is not available either to the High Court or the civil courts and only the Supreme Court can invoke its extraordinary jurisdiction under Article 142 of the Constitution of India to do complete justice to the parties, when faced with a situation where the marriage tie is completely broken and there is no possibility whatsoever of the spouses coming together again. It was further declared that under the existing laws, the consent given by the parties at the time of filing of the joint petition for divorce by mutual consent, must subsist till the second stage when the petition comes up for orders and a decree of divorce is finally passed.

29. Similarly, in the case of Hitesh Bhatnagar (supra), going by the language used in Section 13B(2) of the Act, the Supreme Court clarified that one of the parties may withdraw their consent at any time before passing of the decree of divorce and unless there is a complete agreement between the husband and wife for dissolution of the marriage and unless the court is completely satisfied that a free consent has been given by both the parties, a decree of divorce by mutual consent cannot be granted.

30. Interlinked with the aspect of free consent, is the question as to whether once a consent is given and later on, it is withdrawn by one of the parties, can the court enquire into the bonafides or otherwise of the withdrawal of the said consent. The said issue was examined by a Division Bench of the Kerala High Court in the case of Rajesh R. Nair (supra) and answered thus:-

"19. The further question to be considered is whether once consent is given and is later withdrawn by one of the parties, whether the Court can enquire into the bona fides or otherwise of the withdrawal of the consent. ***By providing that the enquiry under S. 13B(2) shall be only if consent is not withdrawn, the statute specifically recognizes the right of the parties to withdraw the consent even at the stage of the enquiry contemplated under S. 13B(2). That right available to the parties is an unqualified right and for any reason whatsoever, if the parties or one of them, choose to withdraw their consent, such withdrawal of consent is in exercise of the right available under S. 13B(2). If that be so, it is not for the court to probe into the bona fides or reasonableness of withdrawal of consent and once consent is withdrawn, the only option available to the Court is to close the matter at that stage.*** *If that be the legal position, we are unable to find any fault on the part of the Family Court in having dismissed the petition on the ground of non-compliance of the requirement of S. 13B(2) of the Act."* (emphasis added)

31. As against the above view, in the case of Prakash Alumal Kalandari (supra), a Division Bench of the Bombay High Court had observed that the appellant/husband therein did not have the right to withdraw his consent for granting divorce under Section 13B of the Act and held as follows:-

"16. ***As aforesaid, if the Petition is filed "simplicitor under Section 13B of the Act" for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if one party unilaterally withdraws his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act.*** *However, the situation would be different if the parties in the first instance resort to Petition for relief under Section 9 or 13 of the Act and during the pendency of such Petition, they decide to invite decree for divorce by mutual consent.* ***On the basis of agreed arrangement, if the parties were to execute Consent***

> ***Terms and then file a formal Petition/Application to convert the pending Petition to be treated as having been filed under Section 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the Consent Terms either wholly or in part to his/her detriment.*** *In other words, the Court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent."* (emphasis added)

32. We do not propose to examine the other judgment of the Bombay High Court in the case of Ishita Kunal Sangani (supra) cited before us as the same has since been quashed by the Supreme Court vide judgment dated 27.01.2015, reported as **MANU/SC/0406/2015**.

33. It can be seen from the above that the Supreme Court has held that mutual consent is an indispensable condition for passing a decree of divorce under Section 13B of the Act and such a mutual consent should continue from the time of filing the First motion petition, till the divorce decree is passed and the marital ties finally snapped. The underlying thread of Section 13B is the mutuality aspect, a factor that should remain in force from the starting point i.e., the date when the parties jointly file the First motion petition under Section 13B(1) to the stage when they file the Second motion petition under Section 13B(2), till a final decree for divorce by mutual consent is granted by the concerned court.

WHETHER VIOLATION/BREACH OF UNDERTAKING/ SETTLEMENT AGREEMENT/CONSENT ORDER/DECREE WOULD AMOUNT TO CONTEMPT OF COURT

34. Proceeding further, it is necessary to examine the judicial precedents on the aspect as to whether violation or breach of the undertaking forming a part of a settlement agreement/consent order or a decree of a court would amount to contempt of court.

35. In the case of Ashok Paper Kamgar Union (supra), the Supreme Court had examined the provision of Section 2(b) of the Contempt of Court Act that defines the term *'civil contempt'* and held as follows:-

> *"17. Section 2(b) of Contempt of Courts Act defines 'civil contempt' and it means willful disobedience to any judgment, decree, direction, order, writ or other process of a Court or willful breach of undertaking given to a Court. 'Wilful' means an act or omission which is done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or to disregard the law. It signifies a deliberate action done with evil intent or with a bad motive or purpose.* ***Therefore, in order to constitute contempt the order of the Court must be of such a nature which is capable of execution by the person charged in normal circumstances. It should not require any extra ordinary effort nor should be dependent, either wholly or in part, upon any act or omission of a third party for its compliance. This has to be judged having regard to the facts and circumstances of each case. .....****"* (emphasis added)

36. Coming to the powers of contempt where a consent order has been passed by the court or an undertaking given by the party to a court, in S. Balasubramaniyam (supra), the Karnataka High Court has held as follows:-

*"19. **Orders of Courts have to be obeyed unless and until they are set aside in appeal/revision. Alternatively in any proceedings for execution or in a collateral proceedings where an order is sought to be enforced or relied on, it is possible for a party to establish that the order is null and void. Then the Court considering the matter, if satisfied, will hold that the order is null and void and therefore not executable or enforceable.** In this case, the order of eviction dated 6-8-1996 has been confirmed by the Revisional Court by order dated 18-11-1996 which in turn has been confirmed by order dated 18-12-1996 of this Court. These orders are not set aside. They have not been declared or held to be null and void in any proceedings. Therefore, the Respondents cannot assume for themselves that the undertaking given by them is not valid or that therefore they need not comply with it.*

*20. **The principles relating to contempt are clear. The definition Civil Contempt includes willful breach of an undertaking given to a Court. Public interest requires that solemn undertakings given to a Court with the intention of obtaining any benefit should not be breached willfully.** No litigant can be allowed to wriggle away from a solemn undertaking given to the Court, as it will open dangerous trends and defeat the very purpose of giving undertakings to Court. While Courts will not be vindictive, Courts cannot also allow themselves to be trifled with by violating the solemn undertakings given to them. Litigants ought to understand that once they given an undertaking to a Court, they should comply with it in all circumstances, the only exceptions being fraud or statutory bar. They cannot break an undertaking with impunity and then attempt to justify it. **The breach of solemn undertaking given to a Court is a serious matter and will have to be dealt with seriously. Further, while execution of a decree is a matter between the decree holder and the judgment debtor, an undertaking to a Court is a matter between the Court and the person who gives the undertaking to the Court. The right of a landlord to get his tenant vacated in terms of an order of eviction has nothing to do with the solemn***

undertaking given by a tenant to the Court to vacate the premises to obtain the benefit of grant of time for vacating the premises. *It therefore follows that even if the order of eviction becomes unexecutable for any reason, that will not absolve the person giving the undertaking to Court, from acting in terms of it.*

XXX XXX XXX

22. We are of the view that the validity of order of eviction, has nothing to do with a contempt action taken for any willful breach of solemn undertaking given by a litigant to the Court to vacate the premises. Reliance placed on the decision rendered with reference to disobedience of orders passed without jurisdiction, as noticed above, may not be relevant, as the contempt alleged is not willful disobedience of any order/judgment, but willful breach of an undertaking given to this Court. ***We, therefore, hold that irrespective of the fact that an order of eviction is executed or unexecutable, it will not absolve the respondents from their liability and responsibility to act in terms of the solemn undertaking given to the Court.*** *Failure to vacate the premises as undertaken by the tenants – respondent is clearly a willful breach of undertaking given to the Court which is a civil contempt punishable under the Act."* (emphasis added)

37. Taking the discussion further, it is also considered necessary to discuss the power of the court to punish for contempt. In the case of Supreme Court Bar Association vs. Union of India & Anr. reported as **(1998) 4 SCC 409,** the Supreme Court had the occasion to dwell on the constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and the power of the High Court under Article 215 of the Constitution to punish for contempt and held as follows:-

21. It is, thus, seen that the power of this court in respect of investigation or punishment of any contempt including contempt of itself, is expressly made 'subject to the provisions of any law made in this behalf by the parliament' by Article 142(2). ***However, the power to punish for contempt being inherent in a court of record, it follows that no act of parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and the Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt.*** *Parliament has not enacted any law dealing with the powers of the Supreme Court with regard to investigation and punishment of contempt of itself. (We shall refer to Section 15 of the Contempt of Courts Act, 1971, later on) and this Court, therefore exercises the power to investigate and punish for contempt of itself by virtue of the powers vested in it under Articles 129 and 142(2) of the Constitution of India."* (emphasis added)

38. In the case of T. Sudhakar Prasad (supra), reiterating the view expressed in Supreme Court Bar Association (supra), the Supreme Court once again declared that the powers of contempt are inherent in nature and the provisions of the Constitution only recognize the said pre-existing situation. The observations made in para 9 and 10 are apposite and are reproduced hereinbelow:-

9. ***Articles 129 and 215 of the Constitution of India declare Supreme Court and every High Court to be a Court of Record having all the powers of such a court including the power to punish for contempt of itself. These articles do not confer any new jurisdiction or status on the Supreme Court and the High Courts. They merely recognise a pre-existing situation that the***

Supreme Court and the High Courts are courts of record and by virtue of being courts of record have inherent jurisdiction to punish for contempt of themselves. Such inherent power to punish for contempt is summary. It is not governed or limited by any rules of procedure excepting the principles of natural justice. *The jurisdiction contemplated by Articles 129 and 215 is inalienable. It cannot be taken away or whittled down by any legislative enactment subordinate to the Constitution. The provisions of the Contempt of Courts Act, 1971 are in addition to and not in derogation of Articles 129 and 215 of the Constitution. The provisions of Contempt of Courts Act, 1971 cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the said two Articles.*

10. In Supreme Court Bar Association Vs. Union of India (1998) 4 SCC 409, the plenary power and contempt jurisdiction of the Supreme Court came up for the consideration of this Court and in that context Articles 129, 142, 144 and 215 of the Constitution were noticed. This Court held that courts of record enjoy power to punish for contempt as a part of their inherent jurisdiction; the existence and availability of such power being essential to enable the courts to administer justice according to law in a regular, orderly and effective manner and to uphold the majesty of law and prevent interference in the due administration of justice (para 12). No act of Parliament can take away that inherent jurisdiction of the Court of Record to punish for contempt and Parliaments power of legislation on the subject cannot be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts though such a legislation may serve as a guide for their determination of the nature of punishment which a Court of Record may impose in the case of established contempt. Power to investigate and punish for contempt of itself vesting in Supreme Court flows from Articles 129 and 142 (2) of the Constitution independent of Section 15 of the Contempt of Courts Act, 1971 (para 21). Section 12 of the Contempt of Courts Act, 1971 provides for the punishment which shall ordinarily be imposed by the High Court in the case of an established contempt. This

*section does not deal with the powers of the Supreme Court to try or punish a contemnor in committing contempt of the Supreme Court or the courts subordinate to it (paras 28, 29,37). **Though the inherent power of the High Court under Article 215 has not been impinged upon by the provisions of the Contempt of Courts Act, the Act does provide for the nature and types of punishments which the High Court may award. The High Court cannot create or assume power to inflict a new type of punishment other than the one recognised and accepted by Section 12 of the Contempt of Courts Act, 1971.**"* (emphasis added)

39. In the case of Rama Narang (supra), where a preliminary objection was taken by the respondent therein as to the maintainability of the contempt petition filed by the petitioner before Supreme Court by taking a plea that the consent order recorded before the court did not contain an undertaking or an injunction of the court and could not form the basis of any proceedings for contempt. In other words, the mere imprimatur of the court to a consent arrangement was stated to be insufficient to attract contempt jurisdiction. It was also argued that only such consent orders that are coupled with an undertaking or an injunction order of the court, could be the subject matter of contempt proceedings.

40. Exploring the history of the provisions of the Contempt of Court Act, as initially legislated in the year 1952, followed by the 1971 Act, and alluding to the judicial precedents, the Supreme Court interpreted the language of Section 2(b) of the 1971 Act that defines *"civil contempt"*, in the context of a compromise decree and declared as below:-

*"23. ..... **As we have earlier noted, the section itself provides that willful violation of any order or decree etc. would***

__tantamount to contempt. A compromise decree is as much a decree as a decree passed on adjudication.__ It is not as has been wrongly held by the Calcutta High Court in Nisha Kanto Roy Chowdhury (supra) [AIR 1948 Cal. 294] merely an agreement between the parties. __In passing the decree by consent, the Court adds its mandate to the consent. A consent decree is composed of both a command and a contract.__ The Bombay High Court's view in Bajranglal Gangadhar Khemka (supra) [AIR 1950 Bombay 336] correctly represents the law that a consent decree is a contract with the imprimatur of the Court. __'Imprimatur' means 'authorized' or 'approved'. In other words by passing a decree in terms of a consent order the Court authorizes and approves the course of action consented to.__ Moreover, the provisions of Order 23 Rule 3 of the Code of Civil Procedure requires the Court to pass a decree in accordance with the consent terms only when it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement.

24. All decrees and orders are executable under the Code of Civil Procedure. Consent decrees or orders are of course also executable. __But merely because an order or decree is executable, would not take away the Courts jurisdiction to deal with a matter under the Act provided the Court is satisfied that the violation of the order or decree is such, that if proved, it would warrant punishment under Section 13 of the Act on the ground that the contempt substantially interferes or tends substantially to interfere with the due course of justice.__ The decisions relied upon by the respondents themselves hold so as we shall subsequently see." (emphasis added)

41. In the captioned case, the Supreme Court concluded that the consent terms arrived at between the parties before it, having been incorporated in the order passed by the court, any violation of the said terms of the consent order

would tantamount to violation of the court's order and therefore, be punishable under the first limb of Section 2(b) of the Contempt of Court Act, 1971.

42. In Kanwar Singh Saini (supra), the Supreme Court added a word of caution while examining a case where proceedings for criminal contempt under Section 19(1)(b) of the Act of 1971 were initiated against the appellant therein for breach of an undertaking given by him before the civil court in a suit for permanent injunction filed against him and based on the said undertaking, the suit was disposed of. The Supreme Court held that once the suit stood decreed, if there is a grievance of non-compliance with the terms of the decree passed in the suit, a remedy is available to the aggrieved person to approach the Execution Court but resort cannot had to contempt proceedings, by invoking Order XXXIX Rule 2A of the CPC, as such a provision is available only during the pendency of the suit and not after the conclusion of the trial. The view that contempt jurisdiction cannot be used to enforce a decree passed in a civil suit, was expressed in the following words:-

> *"20.* ***The proceedings under Order 39 Rule 2-A are available only during the pendency of the suit and not after conclusion of the trial of the suit. Therefore, any undertaking given to the court during the pendency of the suit on the basis of which the suit itself has been disposed of becomes a part of the decree and breach of such undertaking is to be dealt with in execution proceedings under Order 21 Rule 32 CPC and not by means of contempt proceedings.*** *Even otherwise, it is not desirable for the High Court to initiate criminal contempt proceedings for disobedience of the order of the injunction passed by the subordinate court, for the reason that where a decree is for an injunction, and the party against whom it has*

been passed has willfully disobeyed it, the same may be executed by attachment of his property or by detention in civil prison or both.

XXX XXX XXX

30. ***In an appropriate case where exceptional circumstances exist, the court may also resort to the provisions applicable in case of civil contempt, in case of violation/breach of undertaking/judgment/order or decree. However, before passing any final order on such application, the court must satisfy itself that there is violation of such judgment, decree, direction or order and such disobedience is willful and intentional.*** *Though in a case of execution of a decree, the executing court may not be bothered whether the disobedience of the decree is willful or not and the court is bound to execute a decree whatever may be the consequence thereof. In a contempt proceeding, the alleged contemnor may satisfy the court that disobedience has been under some compelling circumstances, and in that situation, no punishment can be awarded to him. {See Niaz Mohammed v. State of Haryana [(1994) 6 SCC 332], Bank of Baroda v. Sadruddin Hasan Daya [AIR 2004 SC 942] and Rama Narang v. Ramesh Narang [AIR 2006 SC 1883]}. Thus, for violation of a judgment or decree provisions of the criminal contempt are not attracted."*

43. In the case of Shailesh Dhairyawan vs. Mohan Balkrishna Lulla reported as **(2016) 3 SCC 619**, the Supreme Court reiterated the view as expressed in the case of Rama Narang (supra) that an order of consent is not a mere contract between the parties, but something more. We may usefully refer to para 21 of the said decision:-

"21. In fact, as has correctly been pointed out by learned counsel for the respondent, Section 89 of the CPC specifically provides that a Court hearing a suit may formulate terms of settlement between the parties and may either settle the same or refer the same for settlement by conciliation, judicial settlement, mediation or arbitration. On the facts in the present

case, it is clear that following the mandate of Section 89, the Bombay High Court disposed of the suit between the parties by recording the settlement between the parties in clauses 1 to 7 of the consent terms and by referring the remaining disputes to arbitration. In the present case therefore it is clear that it is the Bombay High Court that was the appointing authority which had in fact appointed Mrs. Justice Sujata Manohar as arbitrator in terms of clause 8 of the consent terms. ***We must remember, as was held in C.F. Angadi v. Y.S. Hirannayya, [1972] 1 SCC 191 that an order by consent is not a mere contract between the parties but is something more because there is super-added to it the command of a Judge.*** *On the facts of the present case, it is clear that the Bombay High Court applied its mind to the consent terms as a whole and appointed Mrs. Justice Sujata Manohar as arbitrator for the disputes that were left to be resolved by the parties. The said appointing authority has been approached by the respondent for appointment of a substitute arbitrator, which was then done by the impugned judgment. This would therefore be "according to the rules that were applicable to the appointment of the arbitrator being replaced" in accordance with Section 15(2) of the Act. We, therefore, find that the High Court correctly appointed another independent retired Judge as substitute arbitrator in terms of Section 15(2) of the Arbitration Act, 1996. The appeal is, therefore, dismissed."* (emphasis added)

44. On a conspectus of the judicial pronouncements referred to above, it is clear that the contours of contempt jurisdiction are entirely different. The Supreme Court and High Courts by virtue of being courts of record, have the inherent jurisdiction to punish for contempt of court and the 1971 Act is in addition to the said constitutional powers. Section 2(b) of the 1971 Act not only encompasses willful disobedience to any judgment, decree, direction, order etc. of a court, it also takes in its fold a willful breach of an undertaking given to a court. Breach of an undertaking given to the court is a solemn

matter, more so when the court places its imprimatur on the same by passing a consent order/decree. Simply because a decree/order is executable in law, will not take away the court's jurisdiction to initiate contempt proceedings and if satisfied that the said breach of the undertaking/settlement agreement/consent order or decree on the part of the defaulting party is willful and intentional or substantially interferes or tends to interfere with due course of justice, impose punishment under Section 13 of the 1971 Act.

45. At the same time, the courts have held in several judicial pronouncements that contempt jurisdiction should be exercised sparingly and even if it finds that a party has committed contempt of court, courts can always exercise their discretion to drop contempt proceedings, depending on the facts and circumstances of a case. If the alleged contemnor can satisfy the court that such a disobedience/breach of the undertaking/settlement agreement/consent order/decree was under some compelling circumstances and not on account of any deceit or fraud etc. or that the terms were not executable or enforceable in law, then the court can exercise its discretion to drop the said proceedings and decline to punish the contemnor. The court can also give directions to remedy/rectify the consequences of the actions suffered by the aggrieved party, caused on account of the breach of the undertaking/settlement agreement/consent order/decree. However, a contempt proceeding remains a matter exclusively between the court and the alleged contemnor. In the case of D.N. Taneja vs. Bhajan Lal reported as **(1988) 3 SCC 26** and referred to by Mr. Ashish Virmani, the Supreme Court has highlighted the said position and held that any person, who moves the court for contempt, only brings to the notice of the court certain facts

constituting contempt of court. After furnishing the said information, he may assist the court but at the end of the day, there are only two parties in such proceedings, the court and the contemnor.

NATURE AND EFFECT OF WAIVER AND WHETHER IT INVOLVES PUBLIC RIGHT

46. It is next considered necessary to examine the nature and effect of waiver in the light of the arguments addressed by one set of counsels before us that either party for whose benefit the requirements or conditions have been provided for in the Statute, can waive such a right, subject to the condition that no public interest is involved therein and therefore, it must be bound by an undertaking given or a consent order passed, foregoing a statutory right.

47. In the case of Krishna Bahadur (supra), the Supreme Court discussed the principles of waiver, vis-à-vis the principles of estoppel and observed as below:-

> *"9. The principle of waiver although is akin to the principle of estoppel; the difference between the two, however, is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration.*
>
> *10. **A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being.***

Statutory right, however, may also be waived by his conduct.*"*
(emphasis added)

48. In the case of Lachoo Mal (supra), a Division Bench of the Allahabad High Court explained the doctrine of waiver as follows:-

> *"6.* ***The general principle is that everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity which may be dispensed with without infringing any public right or public policy.*** *Thus the maxim which sanctions the non-observance of the statutory provision is* ***"cuilibet licat renuntiare juri pro se introducto"****. (See Maxwell on Interpretation of Statutes, Eleventh Edition, pages 375 & 376.)* ***If there is any express prohibition against contracting out of a statute in it then no question can arise of any one entering into a contract which is so prohibited but where there is no such prohibition it will have to be seen whether an Act is intended to have a more extensive operation 'as a matter of public policy'.*** *In Halsbury's Laws of England, Volume 8, Third Edition, it is stated in paragraph, 248 at page 143:-*
>
> > *"****As a general rule, any person can enter into a binding contract to waive the benefits conferred upon him by an Act of Parliament, or, as it is said, can contract himself out of the Act, unless it can be shown that such an agreement is in the circumstances of the particular case contrary to public policy.*** *Statutory conditions may, however, be imposed in such terms that they cannot be waived by agreement, and, in certain circumstances, the legislature has expressly provided that any such agreement shall be void."*
> >
> > (emphasis added)

49. Dealing with the Land Acquisition Act, in the case of Pramod Gupta (supra), the Supreme Court has held that a right to claim interest under the said Act, can be waived by a party for whose benefit such a right exists.

50. It has thus been held that ordinarily, waiver is contractual in nature inasmuch as two parties can enter into a contract in their private capacity and agree that one of them being well aware of its rights, will not assert the said right, for a consideration. However, where the Statute prohibits contracting out, then the parties cannot enter into such a contract as it would be opposed to public policy.

51. It is also necessary to examine the inference of waiver arising out of a settlement agreement arrived at between the parties through the ADR routes contemplated in Section 89 of the CPC. Dealing with the elements of a settlement agreement arrived at between the parties before the Delhi High Court Mediation and Conciliation Centre and its implications, a Division Bench of this Court in the case of Angle Infrastructure (supra) had the occasion to examine the nature of the ADR process, as spelt out in Section 89 of the CPC and citing the law laid down by the Supreme Court in the case of Afcons Infrastructure (supra), it was held as below:-

> *"75. The reference in Rule 25 of the Delhi High Court Mediation and Conciliation Rules that, on receipt of any settlement, if the court is satisfied with regard to the settlement, it "shall" pass "a decree" in accordance with terms thereof would neither override the statutory mandate of the Arbitration & Conciliation Act, 1996 nor the provisions of the Code of Civil Procedure. It cannot proscribe the jurisdiction of the court to pass a decree as well.*
>
> *76. The Mediation and Conciliation Rules, 2004 derive their existence as well as statutory authority from the Code of Civil Procedure and cannot confer such substantive rights which the enabling Act does not prescribe.* ***The intention of the rule***

making authority by Rule 25 is to give sanctity to a settlement agreement reached in mediation in accordance with law. Such intention and purpose is achieved if the substantive proceedings are disposed of either by passing a decree in the suit in terms of the settlement or the proceeding only if the substantive law so mandates. It is also achieved by an order accepting and disposing of the proceeding in terms of the settlement in proceedings where the substantive law does not envisage passing a decree as under the Arbitration and Conciliation Act, 1996. Such an order (passed in terms of the settlement agreement) would be executable under Section 36 of the Code of Civil Procedure in the same manner as a decree." (emphasis added)

52. It is pertinent to note that in Afcons Infrastructure (supra), the Supreme Court has meticulously analyzed the general scope of Section 89 of the CPC and examined the issue as to whether the said provision empowers the court to refer the parties to a suit, to arbitration without the consent of both the parties. On what would be the appropriate stage at which the court should explore whether the matter should be referred to the ADR process, the Supreme Court held that in civil suits, the appropriate stage is after completion of pleadings, but in family disputes or matrimonial cases, the ideal stage for mediation is immediately after the respondent is served and before the objection/written statement is filed, for the reason that in such cases, the relationship between the parties becomes hostile due to various allegations/counter allegations leveled against each other in the pleadings.

53. Dovetailed with the principle of waiver, is the question as to whether an element of public right is involved in a situation where one spouse enters into an agreement with the other and waives a statutory right.

54. As early as in the year 1945, when the petitioner/wife filed an application for fixing maintenance under Section 40 of the Parsi Marriage and Divorce Act, 1936, a Single Judge of the Bombay High Court in Pirojshah Bharucha (supra) was called upon to decide as to whether the consent agreement arrived at between the parties either before or after dissolution of the marriage, would be binding on the wife and whether such an agreement could be treated as contrary to public policy and lastly, whether the court will recognize such an agreement where it has statutory powers under the aforesaid enactment to grant and fix maintenance. Quoting extensively from a judgment of the House of Lords in the case of Hyman vs. Hyman [**1929] A.D.601,** where it was observed that public interest does not allow parties to obtain divorce by mutual consent and that courts cannot forgo their duty and be bound by any estoppels between the parties, on the principle that no such analogy of ordinary action can be applied to the jurisdiction of courts in the matters of divorce, the learned Single Judge held that the question of the wife's maintenance is a matter of public policy and she cannot barter away such a statutory right. Therefore, any contract entered into by the wife giving up her claim to alimony, was held to be a void contract in the eyes of law, apart from being contrary to public policy.

55. The social relevance of the institution of marriage was also underscored by the Supreme Court in the case of Smruti Pahariya (supra) in the following words:-

> *"24.* ***Marriage is an institution of great social relevance with social changes, this institution has also changed correspondingly. However, the institution of marriage is subject to human frailty and error.*** *Marriage is certainly not a mere "reciprocal possession" of the sexual organs as was philosophised by Immanuel Kant (The Philosophy of Law, p. 110, W. Hastie translation 1887) nor can it be romanticised as a relationship which Tennyson fancied as "made in Heaven" [Alymer's Field, in Complete works 191, 193 (1878)]"* (emphasis added)

56. In the case of Jyoti (supra), the appellant/wife had challenged a decree of dissolution of marriage granted by the Family Court under Section 13B of the Act on the ground that her consent had been obtained by deceit and fraud and had argued that even if she had given her consent, the husband and wife had not separated for a minimum period of one year, which is an essential ingredient of Section 13B of the Act, due to which dissolution could not have been granted. In the above factual matrix, the Division Bench of the Gujarat High Court had laid much stress on the fact that marriage is an institution that ought to be sustained and the society and courts must make every effort to build broken bridges between spouses and held as below:-

> *"37.* ***We are of the opinion that such conditions are statutorily provided before a petition for dissolution for divorce on mutual consent can be presented. It was not even open for the parties to waive such conditions.*** *It is not even the case of the parties that such conditions were waived in any case. Any other view would permit the parties to marriage to present a petition for dissolution of marriage within days of marriage urging the*

court to accept a consent petition and dissolve the marriage merely on the ground that the parties have agreed to dissolve such a marriage. ***Such a view would be opposed to the very basic philosophy and principle that as far as possible, the society and the courts make all attempts to ensure that the institution of marriage sustains and is not lightly broken. It is because of these reasons that invariably provisions are made in the statute providing for a cooling-off period before which, no petition for dissolution of marriage can be presented, not only on mutual consent but on any other grounds as well.*** *It is because of this reason that section 23 of the Hindu Marriage Act as well as section 9 of the Family Courts Act make detailed provisions enjoining upon the courts to make all efforts to bring about a settlement and reconciliation between the parties to such divorce petition."* (emphasis added)

57. In the case of Nagendrappa (supra), the question that arose for consideration before the Supreme Court was whether the compromise entered into by the husband and wife under Order XXIII Rule 3 CPC, agreeing for a consolidated amount towards permanent alimony and thereby giving up any future claim for maintenance, once accepted by the court in proceedings under Section 125 of the Cr.PC, would preclude a wife from claiming maintenance in a suit filed under Section 18 of the Hindu Adoption and Maintenance Act, 1956. Describing Section 125 of the Cr.PC as a piece of social legislation that provides for summary and speedy relief to a wife, who is not in a position to maintain herself and her children, an order under the said provision was held to be only tentative in nature, being subject to the final determination of all rights in a civil court. Referring to the provisions of Section 25 of the Contract Act, that contemplates that any agreement which is opposed to public policy, is unenforceable in a court of law and such an

agreement is void since the object is unlawful, the Supreme Court declared that any order passed under Section 125 Cr.PC by compromise or otherwise, cannot foreclose the remedy available to the wife under Section 18(2) of the Hindu Adoption and Maintenance Act, 1956.

58. Insofar as waiver of the waiting period prescribed in Section 13B(2) is concerned, in the recent judgment delivered by the Supreme Court in the case of Amardeep Singh (supra), wherein Section 13B(2) has been interpreted to be procedural in nature, the spirit of the said provision has been highlighted and the Court observed that in cases where the marriage has irretrievably broken down, the waiting period can be waived by the court to enable parties to rehabilitate themselves and start their lives afresh. It is the underlying object of the said provision that has prevailed on the Supreme Court to hold that where a court is satisfied that a case for waiver of the statutory *"cooling period"* under Section 13 B(2) of the Act is made out, it may waive the said period in certain circumstances. The above view has been expressed in the following words:-

> *"16. We have given due consideration to the issue involved. Under the traditional Hindu Law, as it stood prior to the statutory law on the point, marriage is a sacrament and cannot be dissolved by consent. The Act enabled the court to dissolve marriage on statutory grounds. By way of amendment in the year 1976, the concept of divorce by mutual consent was introduced. However, Section 13B(2) contains a bar to divorce being granted before six months of time elapsing after filing of the divorce petition by mutual consent. The said period was laid down to enable the parties to have a rethink so that the court grants divorce by mutual consent only if there is no chance for reconciliation.*

*17. **The object of the provision is to enable the parties to dissolve a marriage by consent if the marriage has irretrievably broken down and to enable them to rehabilitate them as per available options.** The amendment was inspired by the thought that forcible perpetuation of status of matrimony between unwilling partners did not serve any purpose. **The object of the cooling off the period was to safeguard against a hurried decision if there was otherwise possibility of differences being reconciled. The object was not to perpetuate a purposeless marriage or to prolong the agony of the parties when there was no chance of reconciliation. Though every effort has to be made to save a marriage, if there are no chances of reunion and there are chances of fresh rehabilitation, the Court should not be powerless in enabling the parties to have a better option.***

18. In determining the question whether provision is mandatory or directory, language alone is not always decisive. The Court has to have the regard to the context, the subject matter and the object of the provision. This principle, as formulated in Justice G.P. Singh's "Principles of Statutory Interpretation" (9th Edn., 2004), has been cited with approval in Kailash versus Nanhku and ors.[(2005) 4 SCC 480] as follows:

XXX XXX XXX

*19. **Applying the above to the present situation, we are of the view that where the Court dealing with a matter is satisfied that a case is made out to waive the statutory period under Section 13B(2), it can do so after considering the following** :*

i) the statutory period of six months specified in Section 13B(2), in addition to the statutory period of one year under Section 13B(1) of separation of parties is already over before the first motion itself;

ii) all efforts for mediation/conciliation including efforts in terms of Order XXXIIA Rule 3 CPC/Section 23(2) of the Act/Section 9 of the Family Courts Act to reunite the parties have failed and there is no likelihood of success in that direction by any further efforts;

iii) the parties have genuinely settled their differences including alimony, custody of child or any other pending issues between the parties;

iv) the waiting period will only prolong their agony.

The waiver application can be filed one week after the first motion giving reasons for the prayer for waiver. ***If the above conditions are satisfied, the waiver of the waiting period for the second motion will be in the discretion of the concerned Court.***

20. ***Since we are of the view that the period mentioned in Section 13B(2) is not mandatory but directory, it will be open to the Court to exercise its discretion in the facts and circumstances of each case where there is no possibility of parties resuming cohabitation and there are chances of alternative rehabilitation.****"* (emphasis added)

59. In the light of the above decision, wherein the waiting period prescribed in Section 13B(2) of the Act has been declared to be directory in nature and not mandatory, the parties have the option of jointly approaching the court for waiving the said waiting period, which request can be considered and allowed by the court only if it satisfies the parameters laid down in the said decision.

REFERENCE ANSWERED

60. On a conspectus of the case law discussed above, the four questions of law framed by the learned Single Judge are answered thus:-

Question (A) *Whether a party, which has under a settlement agreement decreed by a Court undertaken to file a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both and has also undertaken to appear before the said Court for obtaining divorce can be held liable for*

contempt, if the said party fails to file or appear in the petition or motion or both to obtain divorce in view of the option to reconsider/renege the decision of taking divorce by mutual consent under Section 13B(2) of the Act?

Answer: (a) The answer to Question (A) is yes. The distinguishing feature of Section 13B of the Act, 1955 is that it recognizes the unqualified and unfettered right of a party to unilaterally withdraw the consent or reconsider/renege from a decision to apply for divorce by mutual consent, notwithstanding any undertaking given in any legal proceeding or recorded in any settlement/joint statement, in or outside the court, resulting in a consent order/decree, to cooperate with the other spouse to file a petition under Section 13B(1) or a second motion under Section 13B(2) of the Act, or both. Withdrawal of the consent even at the stage of the enquiry, as contemplated under Section 13B(2), is also in exercise of the right available to a party under the very same provision. In other words, the mutuality of the consent to divorce should commence from the stage of filing the First motion under Section 13B(1) and it should continue at the time of moving the Second motion under Section 13B(2) of the Act, till such time that the court completes the enquiry and a decree of divorce is finally passed. The said element of mutual consent is a *sine qua non* for passing a decree of divorce. This being the legal position, the defaulting party cannot be compelled to file or appear in the petition or motion or both, to obtain divorce by mutual consent.

(b) Any other view will not only impinge on the jurisdiction of the court which has an obligation under the Statute to undertake an independent enquiry before passing a decree of divorce by mutual consent, it will also

encroach upon a statutory right vested in a party under Section 13B(2) of the Act and go against the very spirit of the provision, at the heart of which lies the right of a party to reflect/revisit and retract from its decision of going ahead for grant of divorce by mutual consent, during the cooling off period.

(c) At the same time, a defaulting party can be held liable for civil contempt on the ground of breaching the terms and conditions incorporated in an undertaking given to the court or made a part of a consent order/decree. In the event the aggrieved party approaches the court for initiation of contempt proceedings against the defaulting party for willful/deliberate breach of any of the terms and conditions of an undertaking/settlement agreement/consent order or a decree and takes a plea that as a consequence thereof, he/she has been placed in a disadvantageous position or has suffered an irreversible/grave prejudice, the court in exercise of its inherent powers of contempt, supplemented by the 1971 Act has the requisite jurisdiction to entertain the petition and direct restoration of *status quo ante* in every possible way. Besides directing the defaulting party to disgorge all the benefits/advantages/privileges that have/would have enured in its favour and restoring the parties to the position that was before they had arrived at such a settlement/agreement/undertaking and/or before the consent order/decree was passed in terms of the settlement arrived at/undertakings recorded, the court has the discretion to punish the defaulting party for civil contempt, depending on the facts of a given case. Thus, contempt jurisdiction operates in a different field and is uninfluenced by the fetters imposed on a court under the Act of 1955. The only rider to the above is that no direction can be issued even in contempt proceedings to compel the defaulting party to give

its consent for a decree of divorce by mutual consent, as it is opposed to the object, policy and intent of Section 13B of the Hindu Marriage Act.

61. ***Question (B)*** *Whether by undertaking before a Court to file a second motion under Section 13B(2) of the Act, 1955 at Section 13B(1) stage or by giving an undertaking to a Court to that effect in a separate court proceeding, a party waives its right to rethink/renege under 13B(2) of the Act, 1955? If yes, whether such right can be waived by a party under Section 13B(2) of the Act, 1955?*

Answer:(a) The answer to the first limb of Question (B) is no. Notwithstanding any undertaking given by a party before a court to file a Second motion under Section 13B(2) or at the Section 13B(1) stage or in any separate court proceedings, its right to rethink/renege under Section 13B(2) of the Act, cannot be waived for the reason that such a waiver is proscribed by the Statute that keeps a window open for the parties to withdraw their consent at any stage till the decree of divorce is finally granted. The element of mutual consent remains the *leitmotif* of the said provision and its existence is a salient and recurring theme that like warp and weft, weaves its way through the entire process set into motion at the Section 13B(1) stage, followed by the Section 13B(2) stage, till the very end when a decree of divorce is granted. The right of withdrawal of consent in the above proceedings can be exercised at any stage and exercise of such a discretion cannot be treated as being opposed to public policy. Any other interpretation given to the aforesaid provision would negate the underlying aim, object and intent of the said provision. Once a party decides to have a second thought and on reflection, backs off, the concerned court cannot compel the

defaulting party to give its consent on the basis of an earlier settlement/undertaking.

(b) In view of the answer given to the first limb of Question (B), the second limb of the said question needs no answer.

62. ***Question (D)*** *Whether the judgment in Avneesh Sood (supra) and Shikha Bhatia (supra) are good law in view of the doubts expressed by this Court in paras 19 to 28 and in view of the Division Bench judgment in Dinesh Gulati (supra).”*

Answer: (a) The correct position in law has been expressed by the Division Bench in the case of Dinesh Gulati (supra), where it was held that once the parties do not wish to proceed with the agreement for a mutual consent divorce, then the only appropriate course would be to restore the *status quo ante* by reviving the divorce petition pending between the parties. The only discordant note that the aforesaid judgment appears to strike is the consequential order of quashing the *suo moto* proceedings initiated by the learned Family Court against the defaulting party therein, namely, the husband. Having carefully perused the brief two pages order where one of us (Deepa Sharma, J.) was a member of the Division Bench, it is evident that the said order was passed in the circumstantial facts of the case. There is no discussion on the legal principles governing contempt proceedings, in circumstances where an aggrieved spouse approaches the court alleging breach of the undertaking/settlement agreement/consent order/decree by the defaulting spouse. Nor is there an analysis of the judicial precedents on the said subject. Therefore, it cannot be said that the said order would have a precedential value or has laid down the law on the aspect of the powers of

the court to initiate contempt proceedings for violation of the terms of the consent order/decree/undertaking. It is a settled law that a case is an authority only for what it decides and not for what may incidentally follow therefrom [Refer: Ambica Quarry Works and Anr. vs. State of Gujarat and Ors., **(1987) 1 SCC 213;** Bhavnagar University vs. Palitana Sugar Mill (P) Ltd. and Ors., **(2003) 2 SCC 111;** Bharat Petroleum Corporation Ltd. and Anr. vs. N.R.Vairamani and Anr.**, AIR 2004 SC 778** and U.P. State Electricity Board vs. Pooran Chandra Pandey and Ors., **(2007) 11 SCC 92**].

(b) In the case of Shikha Bhatia (supra), where an amicable settlement between the husband and wife was recorded and an order was passed by the Delhi High Court on an anticipatory bail application filed by the husband and his parents and later on, the husband had willfully violated the undertakings given by him in the agreement, compelling the wife to file a contempt petition, the learned Single Judge arrived at a conclusion that the husband had willfully and deliberately disregarded the settlement recorded in court and on the strength of the said settlement, had virtually stolen an order of bail from the court. It was therefore held that the husband had interfered in the judicial process and was guilty of contempt of court.

(c) In the case of Avneesh Sood (supra), the learned Single Judge was of the view that once the wife had given her consent to file a joint petition for grant of divorce by mutual consent and after crossing the first stage under Section 13B(1), given an undertaking to the court in terms of a settlement recorded in the MOU executed by the parties that she will move the Second motion petition, she could not have reneged from the said undertaking accepted by the court as it would undermine the majesty and authority of the

court and amount to an abuse of the process of the court. In the concluding para of the said judgment, while holding the wife guilty of contempt of court for having breached the undertaking given by her to the Family Court in the First motion petition moved under Section 13B(1) of the Act, notice to show cause was issued to her as to why she should not be punished for contempt of court, primarily on the ground that she had derived benefits and advantages from the settlement executed with her husband.

(d) That the court was mindful of the fact that under the Statute, the wife could not have been compelled to give her consent for moving a Second motion petition, as she had a right to withhold such a consent, can be gleaned from the following observations:-

> *"39. The issue which arises for my consideration is whether the conduct of the respondent in resiling from her undertaking given to the Court, by which she was bound, tantamounts to contempt of Court. "Civil Contempt" is defined to mean willful disobedience of any judgment, decree, direction, order, writ or other process of the Court or wilfull breach of an undertaking given to a Court. The respondent has sought to confuse the issue by asserting that she has a right not to give her consent to proceed further under Section 13-B(2) of the Hindu Marriage Act after the "cooling off" period of 6 months has expired. No doubt, the respondent cannot be compelled to give her consent for moving the second motion petition under Section 13-B(2), and she has the right to withhold such consent. ....."*

(e) In both the captioned cases, the learned Single Judges have in exercise of the powers vested in them under Sections 10 and 12 of the Contempt of Courts Act, 1971 declared the respondents therein as guilty of contempt of court for having breached the undertakings given by them to the court. For holding so, notice was taken of their conduct of violating/breaching the terms

of settlement and their undertakings given to the court and at the same time, seeking to gain advantages/benefits under the very same agreement.

(f) In our respectful submission, the learned Single Judges have correctly expounded the law on the inherent powers of the court to initiate contempt proceedings against the respondents therein for contempt of court in the given facts and circumstances of those cases. Therefore, there is no conflict in the views expressed by the Division Bench in the case of Dinesh Gulati (supra) vis-à-vis the views expressed by the Single Judges in the cases of Avneesh Sood (supra) and Shikha Bhatia (supra).

63. ***Question (C)*** *Whether any guidelines are required to be followed by the Court while recording the undertaking/agreement of the parties with respect to a petition under Section 13B(1) or a motion under Section 13B(2) of the Act, 1955 or both for obtaining divorce?*

Answer: The general guidelines suggested to be followed by the Court while recording undertaking/agreement of the parties are as below:-

(1) If the parties amicably settle their *inter se* disputes and differences, and arrive at a settlement, whether of their own accord, or with the aid and assistance of the court or on exercising the ADR processes (mediation/conciliation/Lok Adalat), or otherwise, the settlement agreement that may be drawn up, must incorporate the following:-

i) Record in clear, specific and unambiguous language, the terms/stipulations agreed upon between the parties;

ii) Record in clear, specific, simple and unambiguous language, the mode, manner, mechanism and/or method for the implementation or compliances of the terms/stipulations agreed upon between the parties;

iii) Record an undertaking of the parties that they will abide by and be bound by the agreed terms /stipulations of the settlement agreement;

iv) Stipulate a fine or penalty as may be agreed upon, in the event of a default of the agreed terms/stipulations of the settlement agreement by either side;

v) Provide for the consequences of the breach of the terms/stipulations of the settlement agreement;

vi) Record a declaration of both the parties in unequivocal and unambiguous terms that they have agreed on each and every term recorded in the settlement agreement, after carefully reading over and fully understanding and appreciating the contents, scope and effect thereof, as also the consequences of the breach thereof, including payment of the fine/penalty, if so agreed;

vii) The settlement agreement must state that the terms have been settled between the parties of their own free will, violation and consent and without there being any undue pressure, coercion, influence, misrepresentation or mistake (both of law and fact), in any form whatsoever. It should also be stated that the settlement agreement has correctly recorded the said agreed terms.

(2) The settlement agreement may include a term/stipulation that the parties have agreed that they would dissolve their marriage by mutual consent, which necessarily has to be in accordance with the law, as provided under Section 13B of the Hindu Marriage Act.

(3) The settlement agreement may include other terms/stipulations settled between the parties including payment of money, transfer of

moveable/immovable properties as for example, jewellery/*stridhan*, maintenance amounts, alimony etc. or plans for the custody of the children/visitation rights of children. The said terms must be scrutinized by the court to satisfy itself that they are in accordance with the spirit of law and are enforceable and executable.

(4) On the said settlement agreement being presented, along with a report (in the event the settlement is arrived at through mediation or conciliation or Lok Adalat) to the court where the proceedings between the parties are *sub judice*, the said court should apply the procedure and principles to be followed by a civil court under and/or analogous to the provisions of Order XXIII Rule 3 of the Code of Civil Procedure.

(5) To avoid any ambiguity or misunderstanding on the part of either of the parties, at a later stage, a clear and unambiguous undertaking to the court must be recorded.

(6) The statements of the parties may be recorded by the court after putting them on oath in the following manner:-

a) the parties should affirm the terms of the settlement;

b) the fact that they have executed the settlement agreement after fully understanding the terms, consents, effect and consequences thereof;

c) that the same has been arrived at of their own free will and volition;

d) that they would be liable for penal consequences in case of breach.

(7) In the alternative, the court may direct the parties to file their respective affidavits affirming the terms and conditions of the settlement. If considered necessary, the court may ask the parties to

formally prove not only the said affidavits, but also the settlement agreement executed by them.

(8) The Court must apply its judicial mind to satisfy itself that the settlement arrived at between the parties is not only bonafide, equitable and voluntary in nature, but is enforceable in law and is not opposed to public policy. The court must also satisfy itself that there is no impediment of any nature in accepting the said settlement and the undertakings of the parties and binding them down thereto.

(9) After perusing the settlement agreement, recording the statements of the parties and/or examining the affidavits filed by them, as the case may be, the Court must specifically accept the statements of the parties and/or the undertakings given by them as also the terms/stipulations of the settlement agreement and direct that they shall remain bound by the same.

(10) Depending upon the jurisdiction of the Court, appropriate orders/decree be passed. The said order/decree, as the case may be, should clearly spell out the consequences of breach, violation of any of the terms of the settlement agreement. In the event any fine/penalty has been agreed to be paid under the terms of the settlement agreement or in case of breach of the same, the order shall state that the said amount will be recovered from the defaulting party. The parties must be informed that they will be liable to be punished for contempt of court in the event of any breach/violation/willful/deliberate disobedience of the terms of the settlement agreement.

(11) A decree/order shall be passed by the Court in respect of the subject matter of the suit/proceedings. For those matters/disputes that are not the subject matter of the suit/proceedings, where a settlement has been reached before a non-adjudicatory ADR fora, the Court shall direct that the settlement agreement shall be governed by Section 74 of the Arbitration and Conciliation Act (in case of a settlement through conciliation) and/or Section 21 of The Legal Services Authorities Act, 1987. (in respect of a settlement by a Mediator or a Lok Adalat) [Refer: Afcons Infrastructure Ltd. (supra)]

(12) If the obligations under the settlement agreement/undertaking/consent order/decree are breached by one party, then, at the instance of the aggrieved party, appropriate orders shall be passed in accordance with law.

(13) For breach of the undertaking given to the concerned court or willful/deliberate violation of a consent order/decree, if so approached or otherwise, the court would take appropriate action as permissible in law to enforce compliance by the defaulting party by exercising contempt jurisdiction as contemplated under Section 2(b) of the Contempt of Court Act, 1971. This will however exclude any coercive orders compelling the defaulting party to give its consent for grant of a decree of divorce by mutual consent, notwithstanding any settlement/undertaking given by the parties before any fora.

64. The present Reference is answered in the above terms.

65. Before parting with this case, we would like to place on record our deep appreciation for the worthy assistance rendered by the learned Amicus

Curiae, Mr. Brij Bhushan Gupta, Senior Advocate. We also express our appreciation for the efforts made by Mr. Sunil Mittal, Senior Advocate, Mr.Ashish Virmani, Mr. Prashant Mendiratta, Ms. Chandrani Prasad and Mr.Rajat Aneja, Advocates who had appeared in the matter.

66. Files of the contempt petitions in which the Reference was made, shall be placed before the roster Bench, for further proceedings in accordance with law on the dates specified in separate orders passed in each case.

67. A copy of this order shall be forwarded by the Registry forthwith to the Principal Judge (Headquarters), Family Courts, Dwarka, Delhi for circulation to all the Family Courts in Delhi.

(HIMA KOHLI)
JUDGE

(DEEPA SHARMA)
JUDGE

MAY 15, 2018
rkb/na/ap